

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANTOS MAREL CARDENAS,

Defendant-Appellant.

UNPUBLISHED

August 22, 2006

No. 261278

Ingham Circuit Court

LC No. 03-001045-FC

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

A jury convicted defendant Santos Marel Cardenas of second-degree criminal sexual conduct.¹ The trial court sentenced Cardenas to serve four to fifteen years' imprisonment. Cardenas appeals as of right. We affirm. We decide this appeal without oral argument.²

I. Overview

Cardenas argues that the trial court erred by admitting certain testimony through the hearsay exception set forth in MRE 803A, by failing to remove a witness during arguments over the admissibility of that witness's testimony, and by selecting a minimum sentence without following the dictates of *Blakely v Washington*.³ We find none of these arguments persuasive.

II. Hearsay Evidence

A. Standard Of Review

We generally review for an abuse of discretion challenges involving the admission of evidence.⁴ However, we review for clear error a trial court's findings of fact.⁵

¹ MCL 750.520c(1)(a) (victim under 13 years of age).

² MCR 7.214(E).

³ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁴ *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

⁵ *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

B. MRE 803A

Hearsay is presumptively inadmissible but is subject to several exceptions provided by the rules of evidence.⁶ Among these exceptions is MRE 803A, which allows testimony concerning a child's statement describing an incident that included a sexual act performed with or on the child-declarant by the defendant if: the child-declarant was under the age of ten when the statement was made, the child-declarant made the statement spontaneously and without indication of manufacture, the child-declarant made the statement immediately after the incident or after excusable delay, and if the statement is introduced through the testimony of someone other than the child-declarant.

Cardenas does not challenge the trial court's determinations that the victim was under the age of ten when the statement was made or that the statement was introduced through the testimony of the victim's father.

To the extent that Cardenas claims the trial court failed to determine that the victim's statements were made spontaneously and without indication of manufacture, we find his argument without merit. The trial court specifically stated:

The statement is shown to have been spontaneous and without indication of manufacture. I don't think there is any indication that it was manufactured at the time, and the witness testified that she made the statement to him within 20 minutes after she—after he obtained custody that day of the child.

We also disagree with Cardenas' claims to the extent that he argues the trial court erred in finding that certain of the victim's statements to her father were spontaneous and without manufacture, and that her delay in telling her father about what happened to her was excusable as having been caused by fear or other "equally effective circumstance" as required by the rule.

Cardenas points to no evidence suggesting that the victim's declaration that she was abused was manufactured or otherwise lacking in spontaneity. To the contrary, Cardenas concedes that there was "no affirmative indication of manufacture." Further, the victim's father testified that the declaration of abuse came about suddenly, within 20 minutes of the victim being returned to his care. The victim's father also testified that he was the victim's primary caregiver at the time, and that his daughter acknowledged this and looked to him for safety. Despite Cardenas' protestation regarding the characterization of the victim's father as the child's primary caregiver, the trial court, crediting the testimony of the victim and her father, had a reasonable basis for finding that the victim viewed her father as filling the primary custodial role, and thus providing a place of safety for the her.⁷ This well supported the trial court's conclusions that the declaration was spontaneous and without manufacture, and that the delay in making the declaration was excusable. We find no clear error in the trial court's findings of fact.

⁶ MRE 801-805.

⁷ We give deference to the trial court's assessment of the witnesses' credibility. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004); *People v Hawkins*, 245 Mich App 439, 459; 628 NW2d 105 (2001).

Nor did the trial court abuse its discretion in admitting the testimony in its entirety. An abuse of discretion exists where an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made.⁸ We conclude that, in light of the victim's testimony and the lack of conflicting evidence, the trial court had a reasonable basis for concluding that the nature, spontaneity, and excusable lapse in timing of the victim's declaration warranted admission of the hearsay testimony in accordance with MRE 803A.

III. Witness's Presence During Argument

A. Standard Of Review

When the trial court heard arguments regarding the admissibility of the victim's father's hearsay testimony, Cardenas neither moved to remove the witness nor otherwise indicated any desire that the witness not be present during arguments. Accordingly, reversal of this unpreserved issue is warranted only if there was plain error affecting substantial rights.⁹ Plain error occurs when the alleged error either resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceeding.¹⁰

B. No Plain Error

Following arguments related to the foundational requirements of the victim's father's testimony under MRE 803A, direct examination continued, and the witness testified that his daughter reported the abuse "spontaneously." Cardenas argues that because the witness remained in court during the admissibility arguments, which mentioned spontaneity as a foundational requirement for his testimony, the witness signaled that he had tailored his testimony to comport with his understanding of that requirement. However, Cardenas fails to cite legal authority that the trial court's failure to remove the witness from the courtroom constitutes error requiring reversal. Indeed, there is nothing inappropriate about a prosecutor discussing anticipated testimony with a witness before trial.¹¹ Thus, because the prosecutor and witness could have properly discussed the foundational requirements at length before the admissibility arguments in question, we conclude that in-court exposure to those arguments did not result in plain error affecting Cardenas' substantial rights. That is, we conclude that the witness's presence in the courtroom did not seriously affect the fairness, integrity, or public reputation of the proceeding.

⁸ *People v Hoffman*, 225 Mich App 103, 104-105; 570 NW2d 146 (1997).

⁹ *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹⁰ *Id.* at 356.

¹¹ See *People v Holtzman*, 234 Mich App 166, 172-173; 593 NW2d 617 (1999).

IV. *Blakely* Challenge

Cardenas challenges the constitutionality of Michigan's sentencing system in light of the United States Supreme Court ruling in *Blakely*. Cardenas asserts that under *Blakely* consideration of sentencing variables that could increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. However, while the Michigan Supreme Court recognizes that the Sixth Amendment prohibits the use of judicially ascertained facts to raise the maximum sentence above the level authorized by the jury's verdict, the Court has held that a defendant does not have the right to anything less than the maximum sentence authorized by the Legislature for the conviction offense.¹² Judges may therefore make certain factual findings and score the offense variables accordingly when determining an appropriate minimum sentence as governed by the legislative guidelines.¹³ The rule in Michigan remains that a sentencing court may take into account facts underlying uncharged offenses, pending charges, and even acquittals.¹⁴ "However, the court may not make an independent finding of guilt of a crime other than that for which the defendant is being sentenced."¹⁵

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

¹² *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006).

¹³ *Id.*

¹⁴ *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled in part on other grounds *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002).

¹⁵ *Newcomb*, *supra* at 427-428.